STATE OF MICHIGAN

COURT OF APPEALS

KEUSCH & SONS,

Plaintiff/Counterdefendant-Appellant,

v

DOUGLAS KYES and BRIGITTE KYES,

Defendants/Counterplaintiffs/Third Party Plaintiffs-Appellees,

and

JULIUS KEUSCH, KENNETH KEUSCH and KEITH KEUSCH,

Third-Party Defendants.

UNPUBLISHED
March 2, 1999

No. 203787
Clinton Circuit Court
LC No. 96-007892 CH

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from a $7,808.65 judgment for defendants. We conditionally affirm, but remand for further factual findings.

In June of 1994, the parties entered into a home construction contract pursuant to which plaintiff agreed to build defendants' house. Plaintiff began construction the next month. After numerous changes to the construction plans and alleged interferences by defendants, and numerous delays in progress allegedly caused by plaintiffs, the parties met in June of 1995 and reached an agreement providing specific times by which plaintiff would complete certain unfinished portions of defendants' house. In August 1995, the parties met again, at which time the contract was terminated. Plaintiff claimed this was a mutual decision, and that the only unresolved issue remained how much defendants owed. Defendants claimed that they unilaterally terminated the contract due to plaintiff's breach. Plaintiff then filed suit for breach of contract, foreclosure of lien, account stated and quantum meruit.

Defendants filed a counterclaim for breach of contract, violation of Builders Trust Fund Act,[1] cloud of title, and violation of the Michigan Consumer Protection Act,[2] and also filed a similar third-party complaint against Julius, Keith and Kenneth Keusch individually. The actions proceeded to a six-day bench trial that resulted in a $7,808.65 judgment for defendants.

Plaintiff first contends that the trial court erred in not determining whether the parties in August 1995 mutually agreed to terminate their contract after plaintiff's alleged breach. The record contains conflicting accounts of the August 1995 meeting. The trial court made no specific finding on this termination issue, but concluded that plaintiff had breached the parties' agreement and that defendants had not. However, regardless of whether plaintiff breached the contract, the parties may have subsequently agreed to terminate, or rescind, the contract. *Strom-Johnson Constr Co v Riverview Furniture Store*, 227 Mich 55, 67; 198 NW 714 (1924). If the parties so agreed, then the lower court likely awarded an inappropriate measure of damages in calculating defendants' damages flowing from plaintiff's breach. See *Kundel v Portz*, 301 Mich 195, 210; 3 NW2d 61 (1942) (Recission is governed by equitable principles, one of which is that an essential prerequisite to the receipt of such relief is the return of what has been received, or its equivalent.); *Adams v Edward M Burke Homes, Inc*, 14 Mich App 578, 166 NW2d 34 (1968) (Recission involves a restoration of the status quo as to both parties.). While the trial court likely rejected the theory that defendants agreed to waive their rights under the parties' agreement, without such an explicit finding by the trial court it is possible that the court failed to consider the effect of an effective waiver and recission following plaintiff's breach. Therefore, we remand for a determination whether the parties in August 1995 mutually terminated the contract, or whether defendants merely informed plaintiff of their intent to unilaterally rescind based on plaintiff's breach. *Maynard v Dorner*, 53 Mich App 568, 574; 220 NW2d 161 (1974) (Citing the predecessor rule to MCR 2.517, this Court remanded because there were contested issues of fact left unresolved by the trial court's opinion).[3]

Plaintiff next claims that the trial court clearly erred in finding that plaintiff failed to perform its contract in a timely manner where the evidence established that defendants' house was a custom house that required additional building time and where defendants made substantial changes throughout the project. In support of this argument, plaintiff compares the progress it made on defendants' house with the progress made by the builder who replaced plaintiff (Truelove). Plaintiff argues that within approximately fifteen months it had completed seventy to seventy-five percent of defendants' house, while it took Truelove approximately nine months to complete the remaining twenty-five percent.[4] Looking at these figures, plaintiff's completion within fifteen months of seventy-five percent of the house seems very reasonable when, at Truelove's pace, the work would have taken approximately twenty-seven months. However, trial testimony revealed that Truelove was less experienced than plaintiff and that Truelove needed to complete some repairs on that portion of the house completed by plaintiff. Furthermore, plaintiff's argument on appeal ignores testimony produced by plaintiff at trial that, without further modifications by defendants, it could have finished the remainder of the house within four to six weeks. If the remaining twenty-five percent should have taken four to six weeks to complete, as plaintiff alleged, then the initial seventy-five percent should have been completed, without modifications, within twelve to eighteen weeks. However, it took plaintiff over three times this amount of time,[5] at least an extra forty-two weeks. Although plaintiff alleged that defendants made substantial modifications

during construction of the initial seventy-five percent portion, the record revealed several unexplained construction delays by plaintiff. Considering all these factors, we are not left with a definite or firm conviction that the trial court erred in finding that plaintiff failed to complete defendants' house within a reasonable amount of time. *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995).

Lastly, plaintiff argues that defendants waived any alleged breach by encouraging plaintiff to continue working on the house after the parties met in June of 1995. Plaintiff contends that because the trial court found it in breach, the court erroneously failed to recognize such a waiver. However, the trial court found that plaintiff had breached the contract in not completing the house by *August* of 1995. An alleged June waiver by defendants of a breach occurring before June was not inconsistent with the court's finding. While the trial court did not make an explicit finding regarding the effect of the June meeting, such a finding is not necessary for a resolution of this issue. It is undisputed that the parties met in June 1995 to reach an agreement regarding completion of the house. Defendants' permitting plaintiff to continue working on the house and acceptance of plaintiff's further services may have constituted a waiver of any existing breach. *Schware v Derthick*, 332 Mich 357, 364; 51 NW2d 305 (1952). Yet, even assuming that the parties waived any pre-June breach and agreed to additional contract terms in June, as evidenced by their signed agreement, the record still supports a finding that plaintiff subsequently breached that modified contract by failing to perform within the time frames established by the June agreement. Therefore, the trial court did not err in finding plaintiff in breach. *Hoffman, supra*.

We remand to the trial court for further findings of fact regarding the effect of the parties' August 1995 meeting. We retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Hilda R. Gage
/s/ Brian K. Zahra

[1] MCL 570.151 *et seq*.; MSA 26.331 *et seq*.

[2] MCL 445.901 *et seq*.; MSA 19.418(1) *et seq*.

[3] After this Court had remanded to the trial court for additional factual findings, the case returned to this Court for review of the trial court's further findings in *Maynard v Dorner (Supplemental Opinion)*, 56 Mich App 7; 223 NW2d 338 (1974).

[4] Timothy Truelove estimated that by August 1995 plaintiff had completed approximately sixty-five percent of the house. Plaintiff produced testimony at trial that by August 1995 it had completed seventy to eighty percent of the house. For the purpose of addressing plaintiff's argument on appeal, we will give plaintiff the benefit of the doubt and adopt the high seventy-five percent figure it has submitted in its brief on appeal.

[5] Plaintiff alleged in its brief on appeal that it had spent approximately fifteen months working on the initial seventy-five percent of defendants' house. Fifteen months at four weeks per month equals sixty weeks.